UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

**FILED**
JUL 15 1:33 PM '93
Clerk, U.S. District Court
Eastern District of California
By _____

DAVID R. HEDGECOCK, et al.,
Plaintiffs,
v.
BLACKWELL LAND COMPANY, INC., et al.,
Defendants.

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CV-F 92-5886 OWW

## MEMORANDUM OPINION GRANTING DEFENDANTS' MOTIONS TO DISMISS

## I

## INTRODUCTION

Defendants filed separate 12(b) (6) motions to dismiss[1] plaintiffs' complaint. The complaint alleges that defendants, along with unnamed co-conspirators participated in anticompetitive activities in violation of

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[1] Three separate motions were filed: one by Blackwell Land Company; one by Berrenda Mesa Water District; and one by the Paramount defendants.

Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2: by their conspiracy to eliminate competition through unfair business conduct; their attempt to monopolize farming and water entitlement within the Berrenda Mesa Water District; and to monopolize the market for water deliveries within the Berrenda Mesa Water District. Plaintiffs also advance several state law claims: intentional and negligent interference with prospective economic advantage; California Cartwright Act and Unfair Competition Laws, Cal. Bus. & Prof. Code §§ 16700-16760, 17000-17101, 17200-17208; breach of fiduciary duty with respect to defendant Berrenda Mesa Water District.

Defendants' motions to dismiss plaintiffs' federal antitrust claims must be granted. Exercise of supplemental jurisdiction over the state claims is unwarranted.

## II

## BACKGROUND STATEMENT

The plaintiffs[2] are individuals, corporations, a trustee, and a general partnership who own or lease land in the Berrenda Mesa Water District. All of plaintiff owners have agreed to detach their land from the District and sell their water allotment of 2.82 acre feet per acre. Defendant Berrenda Mesa Water District ("District"), is a California Water District organized and existing under

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[2] David Hedgecock, Rilda Hedgecock, William Roden, as trustee of the Ernest M. Still Trust, Roden Farms, a general partnership, Cal Farms Invest, Inc., a California corporation, Chandler's Palos Verdes Sand and Gravel, a corporation, Santa Fe Energy Resources Inc., a corporation, Gary Hamilton, and Susan Hamilton.

the California Water Code. The Paramount defendants[3] ("Paramount") are a limited partnership, corporations which are general partners in that limited partnership, and a corporation owning land located in Kern County, California. Defendant Blackwell Land Company, Inc. ("Blackwell") is a Delaware corporation owning land in Kern County. According to plaintiffs, Blackwell controls approximately 25% of the real property in the District and Paramount controls another 30% of the District's property. Together, they own and control over 55% of the real property in the District.

Agricultural water is furnished through the California State Water Project ("SWP"). SWP was established in 1960, under the California Water Resources Development Bond Act ("CWRDB"), California Water Code §12930 *et seq.*, for the purpose of constructing a State Water Resources Development System to distribute water to various parts of the state. SWP is administered by the California Department of Water Resources ("DWR"), pursuant to the CWRDB.

The Kern County Water Agency ("KWA") was created in 1961 for the purpose of acquiring water from the DWR for all of Kern County's member units. KWA acquired SWP water pursuant to a water supply contract with DWR, executed in 1963, which provides for annual deliveries of SWP water to Kern County. In turn, KWA enters into contracts with its member units for delivery of the SWP water supplied by DWR.

The District was created in 1963 under the California Water Code as a member unit of KWA. The District acquires SWP water from KWA pursuant to a water

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[3] Paramount Farming Company, L.P., a California limited partnership; Paramount Farming Enterprises, Inc., a Delaware corporation; Paramount Orchards Holdings, Inc., a Delaware corporation; Paramount Farms, Inc., a Delaware corporation.

supply contract with KWA executed in 1967, for the delivery of water on a permanent annual basis to the landowners within the District. Based on the District's annual supply of water under this contract, each landowner within the District is allotted 2.82 acre feet of water per acre of land per year.

The District has a Board of Directors comprised of five members, who are elected only by landowners in the District, not by the general population living within the District. The landowners are given one vote for every dollar of assessed value of land owned within the District. Cal. Water Code §§ 34700, 35003. Because the larger landowners receive a greater number of votes, they can exert greater influence over the election of Board members.

The California Water Code authorizes the Board to raise revenues by imposing standby charges, ad valorem taxes, and water tolls on landowners in the District. Cal. Water Code §§ 31031, 31032.1, 35470 and 37200. The District is also authorized to impose liens upon property for which standby charges and ad valorem taxes are delinquent and to cause foreclosure sales in order to satisfy such liens. Cal. Water Code §§ 36825, 36950 *et seq.*, 37050 *et seq.*, 37150 *et seq.*, 35479, and 37200 *et seq.*

The District is vested with power to sell water from its allotment in instances where the Board makes a determination that the water is "surplus" and it is in the best interest of the District to do so. Cal. Water Code §§ 35425 and 35604. Before a sale is approved, the District is required to hold hearings, submit a filing to the State of California, and circulate an "Initial Study and Proposed Negative Declaration" regarding any proposed water transfer.

## III

## STATEMENT OF FACTS

Plaintiffs essentially complain that defendants, as private parties and as de facto members of the District Board, are involved in a conspiracy to destroy plaintiffs' businesses, to monopolize the market for water deliveries within the District, and to destroy competition for water. This alleged conspiracy was principally carried out by the two largest landowners in the District, Blackwell and Paramount, who have been able to control the decisions of the District Board. Plaintiffs allege that the Board of Directors, at the direction of Blackwell and Paramount, has pursued the following course of action to destroy plaintiffs' businesses.

In 1986, the two largest landowners in the District were defendant Blackwell and Berrenda Mesa Farming, one of the unnamed co-conspirators who participated in the activities alleged in plaintiffs' complaint. At that time the District Board of Directors was comprised of two directors "hand-picked" by Blackwell, two directors "hand-picked" by Berrenda Mesa Farming, and a fifth director. This Board of Directors decided that approximately one-third of the District's maximum annual entitlement water, or 50,000 acre feet, was surplus to its long-term needs and that it was in the best interest of the District to sell this 50,000 acre feet.

In early 1988, the District took a series of steps to effectuate the sale[4] of 50,000 acre feet of its annual

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[4] On July 15, 1988, the District published Notice of Hearings with respect to this sale to Moulton Niguel, Santa Margarita, and Orange County Water Districts for $1,000 per acre foot, for a total sale price of 50 million dollars. The District also filed with the state clearing house its "Initial Study and Proposed Negative Declaration"

(continued)

entitlement water to the Moulton Niguel Water District, at $1000 per acre foot, for a total of 50 million dollars.[5]

Sometime after July, 1988, Paramount initiated negotiations with Blackwell and West Hills, one of the unnamed co-conspirators, for the purchase of land located within the District. According to plaintiffs, Paramount obtained assurances from these sellers that no sale of entitlement water would take place prior to Paramount's purchase. Pursuant to these negotiations, Paramount, Blackwell and West Hills agreed to oppose and obstruct any water sales from the District to others.

In October, 1988, defendants held a series of secret meetings in which they agreed to prevent the impending transfer of water to Moulton Niguel Water District. At a closed meeting of the Board of Directors on November 22, 1988, the Board representatives allegedly controlled by Blackwell and West Hills withdrew their support for the Moulton Niguel water transfer. An informal vote was held and the sale of water was terminated by a 4 to 1 decision.

In 1989, Paramount became the largest landowner within the District after purchasing substantial acreage from Blackwell and completing the purchase of West Hills' land. Paramount then removed two of the directors from the Board and replaced them with two of its own representatives. After these Board changes were made, Paramount and Blackwell each had two representatives on the Board of Directors, and therefore controlled four of the five Board votes.

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(fn. continued)
regarding the proposed transfer and "took all steps necessary to sell water."

[5] Water is sold to the water districts at $77.00 per acre foot. The District's profits resulting from a sale of 50,000 acre feet, at $1,000 per acre foot, for a total of 50 million dollars would have been substantial.

In March, 1990, the Board held a public meeting in which they voted to suspend the Moulton Niguel water sale with the Paramount representatives and one Blackwell representative voting against the proposed sale.

On September 5, 1990, the Board approved another sale of 20,000 acre feet to Summit Valley Water District, for $1,000 per acre foot, for a total sale price of 20 million dollars. The sale was opposed by the Paramount representatives.

Paramount then threatened the Board with litigation over the proposed water sale and wrote to KWA, urging it not to approve the proposed sale. The pressure applied by Paramount resulted in a decision by the Board to cancel the proposed sale, carried by the votes of Paramount and one of the Blackwell Board representatives.

In October, 1991, the District Board set stand-by charges at $268 per acre and water tolls at $48 per acre for 1992. Plaintiffs complain that the Board decided to impose these fees on plaintiffs knowing that plaintiffs either do not use or do not profit from their use of District water.[6]

In 1992, the District Board rejected a petition submitted by four landowners to the Board requesting the sale of water. The Board then moved to notify landowners, delinquent in their assessments, of possible foreclosure proceedings being brought against them if assessments were not brought current. This action was approved with the two Paramount votes and one Blackwell vote.

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[6] Section 37300 of the California Water Code offers a procedure whereby disgruntled landowners may seek to have their land excluded from a water district by commencing official proceedings. While plaintiffs allege that they have consented to detach their land from the District, they do not claim to have commenced the appropriate exclusion proceedings.

In sum, plaintiffs allege that defendants sought to appoint a majority of the District Board of Directors (apparently through Paramount's acquisition of District land). These "defendant-controlled" Board members reached decisions which were motivated by the anticompetitive interests of defendants to the exclusion of the best interest of the District. The anticompetitive acts taken by the Board are: 1) the refusal to sell the District's surplus water that would result in substantial profits to all landowners; 2) the imposition of stand-by charges on plaintiffs; 3) the threatened foreclosure of plaintiffs' lands, as part of the overall conspiracy by defendants to gain access to water previously allocated to the foreclosed landowners.

## IV

## STANDARD FOR DISMISSAL FOR FAILURE TO STATE A CLAIM

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 2588 (1990).

In deciding a motion to dismiss, the court "must accept as true all material allegations in the complaint and construe them in the light most favorable to" the plaintiff. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *See generally*, Schwarzer, Tashima & Wagstaffe, CAL. PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL (TRG 1991) at ¶ 9:211 p. 9-39.

While the court generally must accept plaintiff's allegations as true, the court need not accept as true

allegations that contradict facts which may be judicially noticed. *Mullis v. United States Bank Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987), *cert denied*, 486 U.S. 1040 (1988). The court need not accept conclusory allegations, nor unreasonable inferences or unwarranted deductions of fact. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981).

## V.

## DISCUSSION

Defendants District, Blackwell and Paramount raise the following issues in their separate motions to dismiss:

1) State action immunity (all defendants);

2) *Noerr-Pennington* immunity (all defendants);

3) The Local Government Antitrust Act of 1984 (Blackwell and Paramount);

4) Failure to allege a proper "relevant market" (District);

5) Failure to allege "antitrust injury" (District);

6) Plaintiffs' state claims under California's Cartwright Act (Paramount); and

7) Dismissal of supplemental state claims if the federal claims are dismissed (District and Blackwell).

### A. State-Action Immunity

The anticompetitive conduct alleged in plaintiffs' complaint can be grouped into the following categories: 1) an unlawful agreement by the private landowner defendants to ensure appointment of their own representatives to the Board in order to achieve a controlling

majority and to manipulate the decisions of the Board; 2) the Board members' refusal to sell surplus water irrespective of the best interests of the District; 3) the Board's decision to impose stand-by charges and water tolls on landowners within the District; and 4) the Board's decision to initiate foreclosure proceedings against landowners delinquent in their assessments.

All defendants contend they are immune from antitrust liability under the state action, or *Parker* immunity doctrine.

The state action immunity doctrine was first announced n *Parker v. Brown*, 317 U.S. 341 (1943), which upheld a California agricultural program that restricted the marketing of privately produced raisins, adopted pursuant to California's Agricultural Prorate Act. Relying on principles of federalism and state sovereignty, the Supreme Court held that the Sherman Act did not apply to anticompetitive restraints imposed by the States "as an act of government." *Id.* at 352.

*Parker* immunity does not apply directly to local governments or state agencies. *City of Columbia v. Omni Outdoor Advertising, Inc.*, __ U.S.__, 111 S.Ct. 1344, 1349 (1991); *Town of Hallie v. Eau Claire*, 471 U.S. 34, 38 (1985). The anticompetitive acts alleged here were carried out by the District at the direction of the private defendants, Blackwell and Paramount.

Anticompetitive conduct is protected by the *Parker* doctrine if it satisfies two requirements set forth in *California Retail Liquor Dealers Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97, 105 (1980). First, "the challenged restraint must be clearly articulated and affirmatively expressed as state policy." *Midcal*, 445 U.S. at 105. Second, "the policy must be actively supervised by the State itself." *Id.* This prong is satisfied if state officials have and exercise their power to review particular anticompetitive acts of private parties and disapprove

those that fail to accord with state policy. *Patrick v. Burget*, 486 U.S. 94, 101 (1988). However, where the activities are carried out by a municipality performing a government function, the active supervision prong of the *Midcal* test need not be met. *Town of Hallie*, 471 U.S. at 46.

### 1. Clearly Articulated State Policy

The "clearly articulated" requirement is met where the State legislature authorizes the challenged action and the legislature articulates a policy to displace competition with regulation. *Traweek v. City and County of San Francisco*, 920 F.2d 589, 591-92 (9th Cir. 1990). The delegating statute need not explicitly permit the displacement of competition. *City of Columbia*, 111 S.Ct. at 1350. It is enough "if suppression of competition is the 'foreseeable result' of what the statute authorizes." *Id.*, quoting *Town of Hallie*, 471 U.S. at 41-42.

The District Board actions of which plaintiffs complain are expressly authorized by the California legislature. Plaintiffs allege that the Paramount defendants entered into certain transactions for the acquisition of land within the District, for the purpose of placing Paramount representatives on the District Board of Directors. California law authorizes water district boards of directors to be comprised of landowners in the district. Pursuant to California law, the directors are selected by landowners in the district, who vote according to the assessed value of the land they own. Cal. Water Code §§ 34700, 35003. The fact that the Blackwell and Paramount, as the two largest landowners in the District, can successfully influence Board elections, is a

direct result of the voting scheme established by the Legislature.[7]

Plaintiffs also complain that the Board has imposed stand-by charges, taxes and water tolls on landowners in the District. The Board is expressly authorized by California law to impose standby charges, ad valorem taxes and water tolls on landowners in the District. Cal. Water Code §§ 31031, 31032.1, 35470 and 37200.[8]

Plaintiffs charge the Board with threatening to foreclose plaintiffs' properties for failure to pay assessments. Express statutory authority permits the District to impose liens upon lands in the District for which assessments are delinquent and to cause a foreclosure sale of such lands in order to satisfy such liens. Cal. Water Code § 36950 *et seq.*

Plaintiffs claim the principal means defendants have used to destroy plaintiffs' businesses, is their voting control over the Board to prevent the sale of District water. The effect of these decisions has been to deny plaintiffs substantial profits from water sales, which plaintiffs claim would be used to bring their assessments current and allow them to avoid foreclosure of their lands.

The District is vested with the power to sell water from its annual entitlement where it has made a determination that the water is "surplus" and it is in the best

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[7] This voting scheme was challenged and upheld by the Supreme Court in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). *See*, note 11, *infra.*

[8] Plaintiffs do not allege that the fees were imposed in violation of the Water Code, but that the water charges are unfair because plaintiffs do not use their allotment of water. California Water Code §§ 31031, 31032, provide for the imposition of these fees to cover the costs associated with the operation of the water district, whether the water is actually used or not.

interest of the district to do so. Cal. Water Code §35425. The Board's decision not to approve proposed water sales is at the very least a "foreseeable result" of the enactment by the California legislature of Water Code Section 35425. (*See, Kern-Tulare Water Dist. v. City of Bakersfield*, 828 F.2d 514, 519 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988) (where the Ninth Circuit held that the City's refusal to consent to the Water District's attempted water sale was contemplated by the State legislature and subject to *Parker* immunity. "The restriction of transfer is foreseeable within the authority of the city to contract for, acquire and hold water rights . . . .").

Plaintiffs do not refute that all of the District Board decisions complained of were authorized by and complied with California water law.

Next, defendants argue that the California Water Code evinces a clear and affirmative policy by the State of California to displace competition with regulation in the area of a water district's control over water and water rights. Plaintiffs counter that the California Water Code does not clearly articulate state policy to displace competition, but rather, that it demonstrates an intent by the State to encourage competition. Plaintiffs cite to a series of Water Code provisions which permit the sale, lease and other forms of transferring water and water rights.

*Kern-Tulare*, 828 F.2d at 519, holds that the California Water Code is a clear legislative articulation of a state policy to displace competition with regulation in the area of water distribution and water rights. In *Kern-Tulare*, the Ninth Circuit held that the City of Bakersfield was entitled to state action immunity for its refusal to permit a water district to sell certain water it had acquired from the City. *Id.* The Ninth Circuit reviewed California's constitutional and statutory provisions on water rights to conclude that this regulatory

framework "evinces a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of municipal control over water and water rights, so long as the municipality does not engage in waste or unreasonable use." *Id.* The Court explained that the City's refusal to consent to the water district's attempted transfer "is foreseeable within the authority of the city to contract for, acquire and hold water rights, to furnish itself and its inhabitants with water, and to sell, lease, exchange, or transfer surplus water." *Id.* at 519-20.

As plaintiffs contend, the State of California, through various provisions in the Water Code, encourages the transfer of water among its users under certain circumstances. These directives by the legislature, however, are not evidence of a state policy to encourage competition in a water market. The Water Code facilitates the transfers of "surplus" water, e.g., water not needed for city residents, or farming uses, in order to avoid waste and efficiently reallocate water to where it is most needed. For California, where water is a scarce and precious commodity, the Water Code evinces an unequivocal effort by the Legislature to regulate the allocation, distribution and use of its water resources to ensure that water is put to its most beneficial use and waste is avoided."[9]

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[9] Water Code § 100 enunciates the State's "general policy" with respect to water. It states, in pertinent part:

> [i]t is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented . . .

Cal. Water Code § 100

Plaintiffs' attempts to distinguish *Kern-Tulare* are not persuasive. Plaintiffs argue that the Ninth Circuit in *Kern-Tulare* based its decision on provisions of the Water Code dealing with municipalities and the conservation of domestic water use, which are not at issue in the present case. In fact, the Ninth Circuit's review of California law and the Water Code in *Kern-Tulare* was quite broad. The Court began by reviewing California's Constitution, Art. 10, § 2, and the Water Code's statement of general policy, § 100, to find that the purpose of the Legislature is to maximize the beneficial use and avoid waste of the State's water resources. The Court then surveyed numerous provisions of the Water Code, including the state's policy favoring water transfers. Water Code sections relied on by plaintiffs, §§ 109, 382, 475,[10] and many others were expressly considered by the Court. *See, Id.* at 519-20. For instance, the Court notes that,

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[10] The Water Code provisions cited by plaintiffs are consistent with California's policy, as stated in *Kern-Tulare*, 828 F.2d at 519, "to displace competition with regulation in the area of municipal control over water and water rights."

For instance, in Water Code § 109, the California Legislature "declares that the growing water needs of the state require the use of water in an efficient manner .... It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import."

Section 382, also cited by plaintiffs, empowers public agencies to "sell, exchange, or otherwise transfer water that is *surplus* to the needs of the agency's water users for use outside of the agency." (emphasis added).

The Costa-Isenberg Water Transfer Act, Water Code § 475, states that it "is the policy of this state to facilitate the voluntary sale, lease, or exchange of water or water rights in order to *promote efficient use*." (emphasis added).

> in empowering municipal corporations to: . . . (3) sell, lease, exchange or otherwise transfer surplus water, Cal. Water code § 382, the legislature contemplated that, in the exercise of those powers, cities might act by contract to preserve access to water for existing and future uses.

*Id.* at 520. After extensive analysis of California's constitutional and statutory framework for water rights, the Court concluded that California's policy is to displace competition with regulation in the are of water rights. *Id.* at 519.

Based on the *Kern-Tulare* decision and independent analysis of the California Water Code in this case, the Court finds the California legislature intended to displace competition with regulation in the area of water distribution and water rights. The Board's decision not to approve a proposed water sale is consistent with this regulatory scheme and is a foreseeable result of the State legislature's authorization to water districts for their sale of surplus water.

**2. Active State Supervision**

Under the second prong of *Midcal*, a party receives *Parker* immunity if the anticompetitive conduct is actively supervised by the State. The Supreme Court in *Town of Hallie*, 471 U.S. at 47, held that the "active supervision" prong of *Midcal* need not be imposed in cases involving anticompetitive conduct by a municipality. The Court reasoned that a municipality is unlike a private party engaging in anticompetitive activity, in which "there is a real danger that [the private party] is acting to further his own interests, rather than the governmental interest of the State." *Id.* The only real

danger foreseen by the Court in dispensing with the active supervision prong for municipalities, is that a municipality will seek to further purely parochial public interests at the expense of more overriding state goals. *Id.* at 47. However, this concern is minimized by the requirement of *Midcal* that the municipality act pursuant to a clearly articulated state policy. *Id.*

Defendants contend that *Town of Hallie* directly applies to the District, which is a "municipal entity" performing a governmental function, and thus, the District defendant need not satisfy the active supervision prong. Plaintiffs argue that defendants' reading of *Town of Hallie* is too broad because *Town of Hallie* merely held that the second prong does not apply to a city government, which the District is not. Additionally, plaintiffs argue that a water district has characteristics of a private actor that so distinguish it from other government entities to necessitate active state supervision over its anticompetitive conduct.

The District is not the municipality/ city government identified in *Town of Hallie*. The District does not provide general public services such as schools, utilities, roads, or anything else of the type ordinarily financed by a municipal body. Not all residents of the Districts are entitled to vote in the election of the Water District's Board members, only landowners. Its voting structure for members of the Board, limited to landowners according to assessed value of the land, is comparable to that of a corporation where the votes are distributed according to the number of shares owned.[11] Because the two

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[11] The same voting scheme, apportioning voting power according to land ownership at the exclusion of nonlandowning residents in the water district, was challenged in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), as being in violation of the Fourteenth Amendment's one person, one vote principle enunciated in *Reynolds v. Sims*. The Supreme Court in *Salyer* held

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defendant landowners own a majority of the land in the District and can exert great influence over Board elections, the District Board is arguably accountable only to these two landowners, as plaintiffs contend.[12] The defendant District is not a general purpose municipal government such as the municipality identified in *Town of Hallie*. However, the Ninth Circuit since *Town of Hallie*, has exempted entities other than municipalities from the active state supervision prong of *Midcal*.

In *Ambulance Service of Reno, Inc. v. Nevada Ambulance Services, Inc.* 819 F.2d 910, 913 (9th Cir. 1987), a Nevada charitable corporation (REMSA), was granted an exclusive franchise for ambulance services by the county district Board of Health, and was closely supervised by the Board. 819 F.2d at 912. The Ninth Circuit held that REMSA was merely an "instrument of

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(fn. continued)
that the Water District defendant is not subject to the *Reynolds* principle, and therefore the State need not show a compelling interest to justify the voting scheme, but that a rational basis justification would suffice. The water district was not subjected to the one person, one vote constitutional standard because of its special limited purpose and the disproportionate effect of its activities on landowners. *Salyer*, 410 U.S. at 728-29.

There is an undeniable tension between the *Salyer* decision declining to apply the *Reynolds* principle to a water district because it does not exercise "normal governmental authority," and defendants' position that the District need not satisfy the *Midcal* requirement of active State supervision on the ground that the District is a "municipal entity performing a governmental function." Defendants' argument has merit, nonetheless. As the dissent in *Salyer* states, "[i]t is hardly to be argued that a public body with the power to take by eminent domain, to issue bonds, to levy taxes, and to provide plans for flood control does not 'perform important governmental functions.' " 410 U.S. at 749.

[12] Plaintiffs contend that four out of the five Board members in the District are "hand-picked" Blackwell and Paramount. Consequently, these defendants exercise control over the Board's decisions.

the municipality" under *Town of Hallie*, and therefore active supervision by the state of Nevada was not required. *Id.* at 913.

*Grason Elec. Co., et al. v. Sacramento Mun. Utility Dist.*, 770 F.2d 833 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986), involved the Sacramento Municipal Utility District ("SMUD"), a public entity created under the California Public Utilities Code,[13] which is virtually the exclusive supplier of retail electricity in Sacramento. 770 F.2d at 835. The Ninth Circuit held that SMUD is a "municipal district" performing a "governmental function" which, under *Town of Hallie*, did not have to show active state supervision. *Id.* at 838.[14]

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[13] Section 12801 authorizes SMUD to

> acquire, construct, own, operate, control or use . . . works or part of works for supplying the inhabitants of the district . . . with light [and] power, . . . and may do all things necessary or convenient to the full exercise of the powers herein granted.

Cal. Pub. Util. Code § 12801.

[14] *Cf. Nugget Hydroelectric v. Pacific Gas and Elec.*, 981 F.2d 429, 435 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2336 (1993). In *Pacific Gas*, Pacific Gas & Electric Co., a California public utility that buys, sells and distributes electricity under the regulation of the California Public Utility Commission, was held immune from antitrust liability for anticompetitive acts, after passing scrutiny under both parts of *Midcal*: articulated state policy and active state supervision.

The municipal utility district in *Grason* is distinguishable from the public utility in *Pacific Gas*. Structurally, SMUD operates like a municipality because it is a creature of statue granted a broad range of municipal powers. For instance, under Cal. Pub. Util. Code, SMUD is empowered to sell bonds (§ 13091), to exercise the right of eminent domain (§ 12703), to tax (§ 12892), to annex territory into the district's boundaries (§ 13651). *Grason*, 770 F.2d at 837. By contrast, Pacific Gas & Electric is a corporation subject to state regulation through the California Public Utility Commission.

The District is a single-purpose governmental entity much like the municipal utility district in *Grason*. The District owes its existence entirely to the State legislature. The District performs governmental functions of water acquisition, allocation and distribution among all landowners in the District. The District is charged with maintenance of water facilities, and is thereby authorized to perform acts necessary or proper "to plan, construct maintain, improve, operate, and keep in repair the necessary works for production, storage, transmission, and distribution of water for irrigation, domestic, industrial, and municipal purposes." Cal. Water Code §§ 35400-35401. The District has the power to raise revenue for district purposes by levying and collecting acreage assessments. Cal. Water Code §§ 35470-35481. The District may impose liens upon lands for which assessments are delinquent and cause foreclosure sales in order to satisfy such liens. Cal Water Code §§ 36825, 36950 *et seq.*, 37050 *et seq.*, 37150 *et seq.*, 35479 and 37200 *et seq*. While the District does not have the broad-ranging police powers of a municipality, it has the authority to make rules and regulations regarding the distribution of water, and violation of such rules is punishable as a misdemeanor. Cal. Water Code §§ 35423, 35424.

The District is a local governmental unit, as a member unit of the Kern County Water Agency, which is defined as a public corporation under Cal. Water Code § 30065. "[P]ublic corporations in California — *water districts*, school districts, reclamation districts, etc. — are clearly considered governmental entities." *Keller v. State Bar of California*, 47 Cal.3d 1152, 1163, 255 Cal.Rptr. 542, 548 (1989), *rev'd on other grounds*, 496 U.S. 1 (1990) (emphasis added).

As a public entity performing a governmental function, the District need not meet the active state

supervision prong of *Midcal* under the Ninth Circuit's application of *Town of Hallie*.

Plaintiffs make no attempt to distinguish the Ninth Circuit case law which expands the applicability of *Town of Hallie* to entities other than municipalities. Plaintiffs instead argue that the active state supervision prong of *Midcal* is required not only for private parties, but is also applicable to government agents engaged in private activity. Plaintiffs contend that the District should be viewed as a private actor because it is financially interested in restraining competition and it acts as a commercial participant in a given market.

Plaintiffs first contend that the state action exemption does not apply to parties who have a financial interest in restraining competition. In support of this proposition, plaintiffs rely on an article by Professor Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 683 (1991), in which he argues that the exercise of governmental authority by financially interested officials should be treated as "private action" subject to antitrust review. Professor Elhauge's theory has not been adopted by the federal courts.[15] Moreover, none of the cases relied on by plaintiffs, cited in Professor Elhauge's article, suggest that *Parker* or *Noerr-Pennington*[16] antitrust immunities do not apply to the actions of a public entity on the ground that the agency or its officials were financially interested in the challenged action.

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[15] Contrary to plaintiffs' intimation, the Supreme Court did not approve the Elhauge theory espoused by plaintiffs in *City of Columbia v. Omni Outdoor Advertising, Inc.*, __ U.S. __, 111 S.Ct. 1344, 1351 (1991).

[16] The *Noerr-Pennington* doctrine provides antitrust immunity to private individuals engaged in efforts to restrain or monopolize trade by petitioning government officials.

Professor Elhauge's theory notwithstanding, the application of state action immunity does not depend on the subjective motivation of the District Board members. *See, City of Columbia*, 111 S.Ct. at 1351.

In *City of Columbia*, an advertising corporation, Columbia Outdoor Advertising ("COA"), which controlled more than 95% of the market and had close relations with city officials, lobbied these officials to enact zoning ordinances restricting billboard construction. The city's restrictions and COA were challenged by a competitor of COA. The competitor argued that governmental regulatory action may be deemed private — and therefore subject to antitrust liability — when it is taken pursuant to a conspiracy with private parties. *Id.* at 1348. The Court held that the existence of a conspiracy between a governmental entity and private parties does not create an exception to state action and *Noerr-Pennington* antitrust immunities. *Id.* at 1351, 1355. In doing so, the Supreme Court rejected the argument that *Parker* and *Noerr-Pennington* immunities should be limited to situations where the governmental action is taken by financially disinterested and politically independent actors. The Court explained that,

> Few governmental actions are immune from the charge that they are "not in the public interest" or in some sense "corrupt." The California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a "conspiracy" to put the "private" interests of the State's raisin growers above the "public" interest of the State's consumers. The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners.

*Id.* at 1352; *See, Nugget Hydroelectric v. Pacific Gas and Elec.*, 981 F.2d 429, 434 (9th Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 2336 (1993) (citing *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985) (bad faith behind anticompetitive conduct of government officials does not defeat immunity; subjective motivation of the individual actors is irrelevant)).

Plaintiffs rely most heavily on two cases, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), cited in Professor Elhauge's article,[17] and *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 786

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[17] Plaintiffs also rely on the following cases cited in Professor Elhauge's article. These cases are not applicable to the District because they involve anticompetitive conduct by private parties.

In *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), the Canadian Government during World War II conferred authority upon a subsidiary of Union Carbide to purchase all vanadium products used by Canadian industries. The plaintiffs alleged that Union Carbide had wrongfully induced its subsidiary to purchase vanadium products only from Union Carbide, thereby excluding plaintiffs from participating in the Canadian market. The Supreme Court found that *Parker* immunity (and *Noerr-Pennington* immunity, discussed *infra*), did not exempt Union Carbide and its subsidiary from liability, because as private parties, they are "not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government." *Continental Ore*, 370 U.S. at 706.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the State Bar, a state agency, and the County Bar, a voluntary private association sought state action immunity for adopting minimum fee schedules for the member attorneys. The Supreme Court held that the State and County Bars were not immune from antitrust liability. Although the State Bar was an administrative agency of the Virginia Supreme Court for purposes of enforcing court rules and regulations, it acted as a private association in enforcing the minimum fee schedules. *Id.* at 792. Important to the Court's holding was the absence of a state-articulated policy to displace competition with the price floors which the State and County Bars had prescribed. *Id.* at 790-91.

F.Supp. 1518 (C.D. Cal. 1991), to argue that where private actors exercise effective control over the official decision-making body, no immunity attaches even though the decision is made by the governmental body. Plaintiffs contend that the Blackwell and Paramount defendants exercise such control over the District Board.

Neither *Allied Tube* nor *Sessions Tank* involve the acts of a public entity. Both cases apply the *Noerr-Pennington* doctrine to efforts by private parties to influence the setting of industry standards for private associations.

In *Allied Tube*, a manufacturer of polyvinyl chloride electrical conduits brought an antitrust action against a manufacturer of steel electrical conduits for conspiring to prevent inclusion of polyvinyl chloride conduit in the National Fire Protection Association's *National Electrical Code*. The Supreme Court held that efforts to influence the setting of a private association's product standards, which were routinely adopted by the state and local governments, did not qualify for *Noerr-Pennington* immunity. *Allied Tube*, 486 U.S. at 504. Rejecting the argument that the Fire Protection Association should be treated as a "quasi-legislative body," the Court held that antitrust immunity did not apply to the standards formulation procedures of a private association without official authority. *Id.*[18]

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[18] Certain ambiguity in the language employed by the Court in *Allied Tube* lends support to the plaintiffs' argument. The Court in *Allied Tube* said: "[t]he dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious," 486 U.S. at 501-02, to which the Court attaches a footnote discussing conspiracies among public and private actors.

The suggestion that antitrust immunity may not apply to government action which is heavily influenced by private parties was directly addressed and rejected in *City of Columbia*, the Supreme

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Similarly, in *Sessions Tank*, the district court following the *Allied* decision, held that efforts to influence the provisions of the Uniform Fire Code, adopted by the Western Fire Chiefs Association, a private association, were not immune from antitrust liability. 786 F.Supp. at 1530.

Next, plaintiffs argue that the state action immunity doctrine does not apply to acts of a public agency acting as a commercial participant in a given market, relying on dicta in *City of Columbia*, 111 S.Ct. at 1351.

In *City of Columbia*, the Court stated: "[the state action] immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." 111 S.Ct. at 1351 (citing *Union Pacific R. Co. v. United States*, 313 U.S. 450, 461 (1941), a case relied on in *Parker*, which held unlawful under the Elkins Act certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities).

This possible exception to the state action immunity doctrine is not a rule of law, and the circuits addressing this argument in cases after *City of Columbia* have rejected a market participant theory as a basis for not

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Court's most recent opinion on state action immunity and the *Noerr-Pennington* doctrine. The *City of Columbia* Court expressly cites *Allied Tube* for fostering the possibility of a conspiracy exception to *Noerr* immunity. 111 S.Ct. at 1355. The exception would apply when government officials conspire with a private party to employ government action as a means of stifling competition. The Court concludes that "a conspiracy exception to *Noerr* must be rejected." *Id.*

granting state action immunity.[19] Moreover, the Ninth Circuit has upheld claims of antitrust immunity by governmental entities that were participants in the relevant markets. For instance, in *Kern-Tulare*, 828 F.2d at 519, state action immunity was held applicable to the City's refusal to permit a water district's sale to other districts. The defendant District here plays no greater role than the City in *Kern-Tulare* as an arguable participant in a state-wide "market"[20] for water under the regulatory scheme established by the California legislature. *See, also, Grason Electric*, 770 F.2d at 838 (anticompetitive actions of municipal utility district that was dominant participant in relevant market held entitled to antitrust immunity).

Whether the District is a participant in a given market, which plaintiffs have failed to clearly define, is not determinative of the immunity inquiry. State action immunity depends on the objective determination, which has been made here, that the State authorized the challenged activities and that there is a clear and express state policy to displace competition with regulation. These findings are sufficient to extend antitrust immunity to the District as a public entity performing a local governmental function.

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[19] *See, e.g., Allright Colorado v. City and County of Denver*, 937 F.2d 1502, 1510 (10th Cir.) *cert. denied*, __ U.S. __, 112 S.Ct. 587 (1991) ("[t]he City's additional status as a possible competitor, or its possible engagement in a "proprietary" activity, is not determinative"); *Paragould Cablevision, Inc. v. City of Paragould, Ark.*, 930 F.2d 1310, 1312-13 (8th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 430 (1991) ("the market participant exception is merely a suggestion an is not a rule of law")

[20] It is difficult to characterize California's water distribution system as a "market" where water transfers require governmental approval.

The anticompetitive acts complained of here were effected through the defendant District, which is immune from antitrust liability under the state action immunity doctrine. Plaintiffs have not named the District Board members as defendants, but instead name Blackwell and Paramount, who have allegedly conspired to restrain trade "through their appointment of a majority of the Board of Directors and control of those Directors." To the extent plaintiffs attempt to attribute acts taken by the Board members to the private defendants, those acts are encompassed under the state action immunity doctrine.

The only private acts alleged are the conspiracy by Blackwell and Paramount to control Board actions. Blackwell and Paramount, as private actors, are not immune under the state action doctrine. They may, however, be protected from antitrust liability for acts intended to influence the actions of the District Board members under the *Noerr-Pennington* doctrine.

**B. *Noerr-Pennington* Immunity**

Defendants and certain unnamed co-conspirators are charged with having entered into various agreements to control the voting on the District's Board. The alleged private acts taken by Paramount and Blackwell, intended to control the decisions of the District's Board are: (1) secret meetings by defendants to influence proposed water sales (the underlying assumption is that, because defendants jointly own a majority of the land in the District, and thereby jointly control a majority of the Board members, their private agreements are implemented through the votes of their Board members); (2) Paramount's efforts to acquire land within the District (and therefore have greater influence over the election of the Board members); (3) a letter by Paramount to the Board of Directors threatening litigation over the

proposed water sale to Summit Valley; (4) a letter by Paramount to KWA advocating against approval of a water transfer.

The defendants' efforts resulted in: (1) the Board's refusal to authorize proposed sales of the District's permanent water entitlement; (2) the Board's setting of stand-by charges and water tolls; (3) the Board's threat of foreclosure proceedings against District landowners delinquent in their assessments.

Defendants contend they are immune from antitrust liability under the *Noerr-Pennington* doctrine for their efforts to influence the Water Board's actions, as governmental activity.[21] The *Noerr-Pennington* doctrine serves as a corollary to state action immunity. The doctrine provides antitrust immunity for "conduct of private individuals in seeking anticompetitive action from the government." *City of Columbia*, 111 S.Ct. at 1354. Whether a private party's political motives are selfish is irrelevant because " '*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.' " *Id.* (quoting *Pennington*, 381 U.S. at 670).

*Noerr-Pennington* immunity is not foreclosed to private parties who conspire with government officials to achieve the desired governmental action. *City of Columbia*, 111 S.Ct. at 1354 (Court rejects conspiracy exception to *Noerr-Pennington* immunity as it rejected such an immunity-destroying exception to *Parker*,). " 'It would be unlikely that any effort to influence legislative

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[21] The doctrine was introduced in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), where the Supreme Court held that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Pennington*, 381 U.S. at 670.

action could succeed unless one or more members of the legislative body became . . . co-conspirators' in some sense with the private party urging such action." *Id.* at 1355-56 (quoting *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975)).

Plaintiffs admit that the private acts of Paramount and Blackwell were efforts to influence or control the District Board decisions to refuse to sell District water, to impose stand-by charges and other fees, and to threaten foreclosure of plaintiffs' land for delinquent charges. Even if these actions were carried out pursuant to an agreement between the private defendants and certain Board members, *City of Columbia* dictates that *Noerr-Pennington* immunity still applies to shield the private defendants from antitrust liability.

Plaintiffs argue that the private defendants' acts are more than an effort to influence government action; rather that [*sic*] through defendants' control of the Water Board, the District is an "instrument to carry out their private interests." If plaintiffs complain that the decisions of the District are the result of collaboration between the private defendants and District Board members, their argument fails under *City of Columbia*, which rejects a conspiracy exception to *Noerr-Pennington* immunity. Plaintiffs certainly cannot contend that *Noerr-Pennington* immunity does not apply where the private party's efforts are successful.

Plaintiffs advance the argument that *Noerr-Pennington* immunity does not apply unless the lobbied government official is politically independent and financially disinterested. Plaintiffs rely on *Allied Tube, Sessions Tank Liners*, and *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), discussed above. Already noted, these cases reject the application of *Noerr-Pennington* immunity to parties engaged in lobbying efforts directed at private actors,

not governmental entities and their officials. Plaintiffs' contention fails because Paramount and Blackwell's actions were directed at the District, which is a public entity empowered by the California legislature to carry out the complained of acts.

Plaintiffs cite *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), as additional support for their argument that the private defendants cannot benefit from *Noerr-Pennington* immunity where the governmental entity is not politically independent, but is instead an instrument of the defendants' private goals.[22] *California Motor* invokes the "sham" exception to the *Noerr-Pennington* doctrine, which recognizes that private actors will not be immune from the antitrust laws where they are not in fact seeking official action by a governmental body, but instead, seek to harm or weaken competitors.[23]

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[22] *California Motor Transport* involved a group of trucking companies which were charged with conspiring to monopolize the transportation of goods by instituting state and federal proceedings to defeat applications by competitors to obtain operating rights. The Court found that a cause of action for antitrust violations was established where the trucking companies combined their efforts to harass and deter their competitors from having free access to the agencies and courts as a way of "building up one empire and destroying another." 404 U.S. at 515.

[23] It is difficult to view the defendants as plaintiffs' competitors seeking a competitive advantage through the manipulation of a governmental entity. Plaintiffs and defendants do not compete in the same agricultural market because the various parties are involved in different farming activities.

Plaintiffs argue that plaintiffs and defendants compete for the water distributed within the District. Plaintiffs claim that defendants seek a greater allotment of the water distributed within the District by foreclosing on the other landowners who receive water. Even if such a "market" for water distribution within the District exists, plaintiffs do not claim that they are being deprived of an adequate

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The sham exception covers situations in which "persons use the governmental process itself — as opposed to the outcome of that process — as an anti-competitive weapon." *City of Columbia*, 111 S.Ct. at 1354.[24] A "classic" example of this exception is "the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay." *Id.* (citing *California Motor*, 404 U.S. 508). *City of Columbia* explains that a sham situation involves a defendant "whose activities are 'not genuinely aimed at procuring favorable government action' at all," whereas *Noerr* immunity applies to one who "genuinely seeks to achieve his governmental result, but does so through improper means." 111 S.Ct. at 1354 (citations omitted).

Blackwell and Paramount's *Noerr-Pennington* immunity does not fail under the sham exception because the defendants' alleged activities were actually directed at the governmental entity, to achieve a desired result from the governmental entity. Blackwell and Paramount claim they sought to prevent the sale of District water to assure the District an adequate water supply through future droughts. The Board's refusal to approve water sales suggests that Blackwell and Paramount's efforts were successful. *City of Columbia* extends Blackwell and Paramount *Noerr-Pennington* immunity even if their

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share of this water as a result of the defendants' actions. In fact, plaintiffs do not use the water they are allotted, but seek to sell it to other governmental entities around the State.

[24] In *City of Columbia* itself, the Court found there was no "sham" where the defendant set out to disrupt the plaintiff's business "not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate product of that lobbying and consideration, viz., the zoning ordinances." *Id.*

ultimate goal is to weaken plaintiffs' businesses, so long as they sought to achieve this goal through governmental action.

### C. Local Government Antitrust Act of 1984

Defendants Blackwell and Paramount contend that plaintiffs' damages claims against them are barred by the Local Government Antitrust Act of 1984 ("LGAA").

LGAA provides that no damages, interest, costs or attorney's fees may be recovered under the Sherman Act "from any local government, or official or employee thereof acting in an official capacity." 15 U.S.C. § 35(a). The term "local government" is defined in the Act to include "a school district, sanitary district, or any other special function governmental unit established by State law . . . ." 15 U.S.C. § 34(1)(B). Defendant District is clearly a "special function governmental unit." Plaintiffs state in their opposition they have not sued the District for damages, only injunctive relief. As to Blackwell and Paramount, plaintiffs may not recover antitrust damages from these private defendants for the acts carried out by the District, i.e., for the refusal to sell water, the imposition of assessments, and foreclosure on lands.

Under LGAA, damages claims are also barred against "a person based on any official action directed by a local government . . . ." 15 U.S.C. § 36. This provision of the Act prevents the recovery of antitrust damages against private defendants for acts taken at the direction of the governmental agency. *See, e.g., IT&E Overseas, Inc. v. RCA Global Communications, Inc.*, 747 F.Supp. 6, 13 (D.D.C. 1990) (citing H.R. Rep. No. 965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4602, 4603) (LGAA eliminates the damage remedy against private persons acting at local

governmental direction); *City Communications, Inc. v. City of Detroit*, 660 F.Supp. 932, 936 (E.D. Mich. 1987) (private defendants acting under official supervision are protected from damage claims under LGAA).

Plaintiffs are arguably not barred by LGAA from recovering damages against defendants Blackwell and Paramount for the private acts alleged, because such acts were not taken in any official capacity or under the direction of the District as official Board acts. However, this issue need not be decided because defendants are otherwise immune from federal antitrust liability for the acts alleged in plaintiffs' complaint.

For the same reasons, it is unnecessary to determine whether plaintiffs' federal antitrust claims adequately allege the relevant product and geographic markets, and antitrust injury under Section 1 and 2 of the Sherman Antitrust Act.

## VI

## CONCLUSION

Plaintiffs have failed to state a federal claim upon which relief may be granted because defendants are immune from federal antitrust liability for the acts alleged in plaintiffs' complaint. Defendants' motions to dismiss plaintiffs' federal antitrust claims are GRANTED without leave to amend.

All that remain are supplemental state claims for intentional and negligent interference with prospective economic advantage, violation of the California Cartwright Act and Unfair Competition Laws, and declaratory relief against the District for breach of fiduciary duty. Because all claims over which this Court has original jurisdiction have been dismissed, and the

state courts have the specialized knowledge to deal with the complex and unique nature of California's water district law and the activities complained of, the Court declines to exercise supplemental jurisdiction over the state claims. 28 U.S.C. §§ 1367(c)(1), (3) and (4); *Les Schokley Racing v. National Hot Rod Ass'n*, 884 F.2d 504, 509 (9th Cir. 1989). These remaining claims are dismissed without prejudice.

SO ORDERED.

DATED: July 14, 1993.

/s/ Oliver W. Wanger
Oliver W. Wanger
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA
July 15, 1993

* * CERTIFICATE OF SERVICE * *

1:92-cv-05886

Hedgecock
v.
Blackwell Land Co

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 15, 1993, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Ronald S. Katz
Four Embarcadero Center
Suite 3550
San Francisco, CA 94111

Kent Francis Heyman
Dowling Magarian Phillips and Aaron
6051 N Fresno Street
Suite 200
Fresno, CA 93710

John R McDonough
Carlsmith Ball Wichman Murray
Case Mukai and Ichiki
555 S Flower Street
25th Floor
Los Angeles, CA 90071

Joseph W Cotchett
Cotchett and Illston
San Francisco Office Airport Center
840 Malcom Road
Suite 200
Burlingame, CA 94010

Timothy John Buchanan
Dietrich Glasrud and Jones
5250 N Palm Avenue
Suite 402
Fresno, CA 93704

Matthew Owen Pacher
Damrell Nelson Schrimp
Pallios and Ladine
1625 I Street
Modesto, CA 95354

Jack L. Wagner, Clerk

BY: /s/ C. Hatcheson
Deputy Clerk